IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 3887 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HIRABEN W/O DECD. BHAILALBHAI HARMANBHAI - Appellant(s)
Versus
KANAIYALAL RANCHHODBHAI MODI & 1 - Defendant(s)

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Appearance :

MR NALIN K THAKKER for Appellant(s) : 1, 1.2.1, 1.2.2, 1.2.3,1.2.4
NOTICE SERVED BY DS for Defendant(s) : 1,
MR HS MUNSHAW for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 13/03/2007

ORAL JUDGMENT

Original claimant who instituted Motor Accident Claims Petition No. 116 of 1990 before the Motor Accident Claims Tribunal No. 2 at

Ahmedabad to receive compensation of Rs.1 lac for the injuries suffered by him in a vehicular accident which occurred on 04/12/1989 around 2.30 p m., expired during the pendency of the petition before the Tribunal on 2/7/1997 and, therefore, the Tribunal dismissed the petition by judgment and award dated 15/4/1998. The Claims Tribunal, on the material produced before it, arrived at a conclusion that the deceased claimant failed to prove the negligence on the part of respondent no. 1, the driver of offending bus which belonged to respondent no. 2 – Ahmedabad Municipal Transport Service. It was the case of the deceased claimant that on the date of accident, the vehicle i.e., bus bearing registration no. GTM 8808 was driven in rash and negligent manner and as a result of the same, it dashed against one pole while taking a turn. The deceased claimant received injuries on right hand including 3 to 4 fractures. The say of the respondents was that there was no negligence on the part of respondent no. 1 and it was upheld by the Tribunal. The Tribunal, therefore, dismissed the petition. However, it carried out the exercise to assess the compensation which could have been awarded to the deceased claimant had he succeeded in establishing the negligence.

1.1. Since the original claimant has expired, his heirs, with the leave of this Court, filed the present appeal to challenge the said judgment of the Tribunal.

2. I have heard Mr. Nalin K Thakkar, learned advocate for the appellant. He has submitted that on the issue of negligence the finding given

by the Tribunal is absolutely erroneous and it is required to be set aside. He has further submitted that the amount determined by the Tribunal is on lower side and it requires upward revision.

3. I have carefully considered the submissions of Mr. Thakkar. I have also perused the record and proceedings of the case. So far as the issue of negligence is concerned, the evidence on record clearly shows that respondent no. 1 was negligent. It is the case of the appellants that the bus dashed against the electric pole while respondent no. 1 was taking the turn. This fact is stated in the petition as well as in the complaint, which is lodged against the driver at Exh. 26. However, the Tribunal has found that it was not stated that while taking the turn, this accident occurred. According to the Tribunal, the deceased claimant had failed to establish that the bus had dashed against the pole. The Tribunal has further observed that even if this is taken to be true that the bus collided with the pole while taking a turn, considering the contents of the FIR at Exh. 26, it was clear that his hand was pressed against the iron frame of the window and his wife and his brother's wife fell on him. He, therefore, sustained injuries. Hence, there was no negligence on the part of respondent no. 1. This reasoning does not appear to be very sound. First of all the deceased claimant has given consistent story in the petition as well as in the FIR that the bus dashed against the pole due to careless driving of respondent no. 1. In the deposition before the Tribunal also he has said the same facts. When that is so, there is no reason to disbelieve this version. Further the Tribunal has held that

even if this version is believed to be true, there was no negligence of respondent no. 1 since according to the deceased claimant himself, he sustained injuries because his hand got caught between the glass pane of the window and it got fractured because his wife as well as his brother's wife fell on him. It is very obvious that had the bus not dashed against the pole due to rash driving of respondent no. 1, the wife and wife of the brother of deceased claimant would not have fallen on him and he would not have received such injuries. Therefore, it is solely the negligence of respondent no. 1 which is responsible for the accident and the resultant injury. I, therefore, quash the said finding of the Tribunal and hold respondent no. 1 negligent of driving his vehicle at the time of accident.

3.1. So far as the quantum of compensation is concerned, I have perused the discussion of the Tribunal and by and large I find that it is just and legal. The question, however, to be decided is whether the appellants who are heirs and legal representatives of the deceased claimant can receive the compensation and if yes, to what extent. This is a case of personal injury. The deceased claimant filed the petition to obtain compensation for the injuries suffered by him in a vehicular accident. Before the Tribunal the proceedings got prolonged and in the meanwhile, after about 7 years of the date of accident, he expired, a natural death. Of-course, he had already given his deposition before the Tribunal. In such circumstances, the appellants would only be entitled to the compensation for loss to the estate of the deceased and not to any

other item such as pain, shock and suffering. I am fortified in my opinion by the judgment of the learned Single Judge of this Court rendered in the case of Jenabai Wd/o. Abdul Karim v/s. G.S.R.T.C., Ahmedabad reported in 1991 (1) G.L.R. 352. In the said decision it has been observed as under :-

> "9. Tort, frequently, involves a non-pecuniary loss. Even pecuniary loss of the deceased, being personal to him and no proper entitlement to a place in the assessment of the damages which goes to his estate. But the pecuniary loss suffered by the deceased on account of such injuries, an action would lie or action would survive for the benefit of the estate of the deceased. The claim, on account of loss to the estate of the deceased, would, undoubtedly, survive and would pass over to his heirs or legal representatives. Section 306 of the Indian Succession Act does not exclude right to recover claim on the basis of proprietory right. In a case of personal injuries, arising out of vehicular accident, it may include pecuniary loss as well. This pecuniary loss or any loss which is referable to the loss to estate would be a proprietory or right pertaining to property. Therefore, the right to maintain the action or to continue the action for recovery of pecuniary and proprietory loss which are referable or attributable to the loss to the estate, cannot be said to have been taken away by the provisions Sec. 306 of the Indian Succession Act. If the provisions of Sec. 306 of the Indian Succession Act is extended to all causes of action, including those affecting proprietory or property, i.e., to the estate, would be stultify to a great extent the provisions of Sec. 212 (2). If it is stretched to that, it would be nugatory, which empowers the Hindu, Mohammadan, Buddhist, Sikh, Jain, Indian Christian or Parsi from applying for letters of administration in case of intestacy. Such a construction of Sec. 306 of the Indian Succession Act would raise a direct conflict with the provisions of Order 22 Rule 3(1) of the Civil

> Procedure Code. Moreover, the liability to pay compensation is created immediately on the occurrence of the accident to the person suffering the injury and must amount to a debt payable to him and pass over to the heirs of the workman on his death and does not abate. Thus, provisions of Sec. 306 of the Indian Succession Act has no application to such cases. Therefore the maxim "*actio personalis moritur cum persona"* on which Sec. 306 of the Indian Succession Act is based, cannot have a blanket applicability in all actions even in case of personal injuries wherein the damages flow from the head or under the head of loss to the estate. It may be mentioned that in England, the said maxim has been criticized as harsh, unconsionable and unjust. The rightful claim falling in the realm of pecuniary or proprietory or loss to the deceased's estate would survive, which is not personal to the deceased. It may also be mentioned that the words "personal injury" occurring in Sec. 306 mean bodily or physical injury as opposed to the injury to the proprietory right. Therefore, a cause of action in respect of injury to the property or loss referable to the deceased's estate flowing from the personal injury would not fall within the exception, but would, undoubtedly, survive. But if interpreted it otherwise, as held by the Tribunal, would mean unjust enrichment and benefit to the wrong-doer's estate and unjustifiable injury to the estate of the deceased. Unfortunately, the Tribunal has failed to address itself to such a vital and important aspect while considering and examining the provisions of Sec. 306 of the Indian Succession Act."

If the judgment of the case on hand is perused, the Tribunal has in detail carried out the exercise in para. 7 of the judgment and it has given the break-up as under :-

Rs.38,400/- towards future loss of income;

Rs.10,000/- towards pain, shock and suffering;
Rs. 9,700/- towards actual loss of income;
Rs. 3,000/- towards medicines;
Rs. 2,000/- towards special food;
Rs. 1,000/- towards transport;
Rs. 800/- towards expenditure incurred by attendants
Rs. 800/- towards gratituous services.

Rs.65,700/- Total
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In-all the Tribunal has awarded a sum of Rs.65,700/-. The aforesaid break-up, however, would show that under the head of pain, shock and suffering the Tribunal has assessed compensation at Rs.10,000/-. This amount cannot be awarded to the appellants. The claim for rest of the items can be allowed since they pertained to the estate of the deceased and the amount would go to it. Hence, the appellants would be entitled to receive Rs.55,700/- by way of compensation. The respondents are directed to pay to the appellants sum of Rs.55,700/- together with interest @ 12% p a from the date of petition till realization and proportionate costs.

On depositing the amount by respondent no. 2, the Tribunal shall disburse the same as under :-

Appellant no. 1/1 – Hiraben, widow of Bhailalbhai Harmanbhai shall be paid 40% of the total amount and appellants no. 1 /2, 1/3

and 1 /4 be paid 20% each of the total amount by account payee cheque after due verification.

Registry is directed to retransmit the R & P to the concerned Tribunal forthwith.

[Akshay H Mehta, J.]

* Pansala.